Viswanathan a/l Kumarasamy & Anor v Kamaluddin bin Mohamed Ariff

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–04 OF 2003 (4)
AZAHAR MOHAMED JC
25 AUGUST 2004

Tort — Road accident — Negligence — Liability — Whether both parties equally at fault

The plaintiff, who was riding a motorcycle, collided with a tractor which was driven by the first defendant. The plaintiff claimed for general and special damages arising from personal injuries sustained by him due to the said accident. Each party claimed that the other had encroached into his rightful path. When the matter came before the sessions court, the trial judge found both parties equally liable. Dissatisfied, the defendant filed this appeal. The issue before this court was in respect of liability only.

Held, dismissing the appeal:

(1) Judging from the evidence as a whole, the first defendant's version of events was unacceptable. Given the slight inclination of the road, poor visibility, the size of the road and the tractor, coupled with the fact that the first defendant was not an experienced driver, it was highly probable that the tractor would have slightly encroached into the opposite side, and that on a balance of probabilities the accident occurred in the center of the road (see para 6).

(2) The plaintiff and the first defendant had committed almost the same act of negligence, ie by failing to keep a proper lookout and failing to drive their vehicles on the correct side of the road. As such, both the parties contributed equally to the accident and each party is 50% to blame (see para 9).

[**Bahasa Malaysia summary**

Plaintif yang sedang menunggang motosikalnya berlanggar dengan sebuah traktor yang dipandu oleh defendan pertama. Plaintif menuntut ganti rugi umum dan ganti rugi khas yang timbul dari kecederaan yang dialaminya disebabkan oleh kemalangan tersebut. Masing-masing mendakwa yang pihak yang satu lagi memasuki laluan sahnya. Apabila perkara ini dibawa ke mahkamah sesyen, hakim bicara memutuskan yang kedua-dua pihak sama-sama bertanggungjawab. Tidak puas hati, defendan memfailkan rayuan ini. Isu di hadapan mahkamah ini hanyalah berhubung dengan liabiliti sahaja.

Diputuskan, menolak rayuan:

(1) Menimbang keterangan secara menyeluruh, versi kejadian defendan pertama tidak boleh diterima. Memandangkan keadaan jalan menaik sedikit, darjah penglihatan yang kurang, saiz jalan dan traktor, bersama dengan fakta yang defendan pertama bukanlah seorang pemandu yang berpengalaman, ianya berkemungkinan besar yang traktor tersebut telah memasuki sedikit ke arah yang bertentangan itu, dan pada imbangan kebarangkalian, kemalangan tersebut berlaku di tengah-tengah jalan tersebut (lihat perenggan 6).

(2) Plaintif dan defendan pertama telah melakukan perbuatan kecuaian yang hampir sama, iaitu gagal berwaspada dan gagal memandu kenderaan mereka pada bahagian jalan yang betul. Dari itu, kedua-dua pihak telah sama-sama menyebabkan kemalangan tersebut dan masing-masing bertanggungjawab 50% (lihat perenggan 9).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 887–1108.

Cases referred to

Baker v Market Harborough Industrial Cooperative Society [1953] 1 WLR 1472 (refd)
Ong Yam Chong & Anor v Chan Wah [1962] MLJ 184 (refd)
Ramoo v Gan Soo Swee & Anor [1971] 1 MLJ 235 (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214 (refd)

Ong Chee Yong (Ong & Ong) for the appellant.
Meneka K a/p Kanasmoorthy (NM Tiong & Co) for the respondents.

Azahar Mohamed JC:

[1] This is an appeal by the appellants (the defendants in the court below) ('the defendants/the first defendant') against the decision of the learned sessions court judge who on 18 December 2002 found the defendants and the respondent (the plaintiff in the court below) ('the plaintiff') equally liable. For convenience, the parties will throughout the judgment be referred to as the plaintiff and the defendants/first defendant. The appeal is only in respect of liability.

[2] This is a running down action. The plaintiff's claim is for general and special damages arising from personal injuries sustained by him as a result of a road accident occurred at approximately 9pm on 30 July 1995 on the Kuala Masai — Jalan Rinting road. At the material time the plaintiff was riding a motorcycle bearing registration No JCV 4094 and had a pillion rider with him. The first defendant was driving a tractor bearing registration No JDX 5142.

[3] The parties have presented two differing versions of how the accident happened. There were two totally opposite versions of the manner in with the accident occurred. Each has alleged that the other encroached into his rightful path. The plaintiff alleged that he was riding his motorcycle from Kuala Masai heading towards Pasir Gudang highway when the tractor driven by the first defendant encroached into his rightful path, causing his right leg to catch onto the bucket of the tractor, nearly severing it. The first defendant's version was that while driving his tractor from the Pasir Gudang highway heading towards Kuala Masai, the plaintiff apparently attempted to overtake a motorcar in front of him and thereby encroached into the first defendant's rightful path, causing the accident.

[4] The defendants' learned counsel submitted that in apportioning liability at 50:50, the learned session court judge had failed to apply his mind to the question of burden of proof; that it is trite law that the burden of proof lies on the plaintiff to prove that the first defendant was negligent. It was the learned counsel's contention that the tractor was driven on its own side of the road and it was the motorcycle which came to collide into it. In these circumstances, according to the learned counsel, the plaintiff must be regarded as wholly responsible for the accident and thus the appeal ought to be allowed with costs.

[5] On the other hand, it was the contention of the learned counsel for the plaintiff that the learned sessions court judge had made the correct findings and that only in exceptional circumstances will an appellant court be justified in interfering with an apportionment of liability made by the trial judge; such circumstances do not exist in this appeal. The learned counsel referred to the Federal Court case of *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214; *Ramoo v Gan Soo Swee & Anor* [1971] 1 MLJ 235 to support her contention that it would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge. I find that learned counsel's submission on this aspect to be without merit. It overlooks certain important aspect of the proceedings in the court below. It is to be noted that the judgment was delivered by the learned sessions court judge who did not hear or see any of the witnesses but based his judgment wholly on the notes of evidence and submissions of both parties. The case was actually heard before another sessions court judge who went on transfer before the judgment was delivered. Since the learned sessions court judge did not see or hear any of the witnesses, there is no question of any benefit or advantage to him from his being the deciding judge in the court of first instance. Thus, the matter of liability therefore has become at large for me sitting as an appellate judge.

[6] The crux of the first defendant's version of the accident as stated earlier was that the plaintiff was actually overtaking a motorcar at the material time and encroached into his path. In my view after carefully considering the

evidence as a whole I am unable to accept the first defendant's version of events for the following reasons. The road leading from the Pasir Gudang highway towards Kuala Masai is on a slight incline; the first defendant would have been traveling uphill before reaching the accident site. There were no streetlights at the time and as such, the accident site was dark. The width of the road was 18 feet, making it a nine foot width lane for vehicles in either directions. Given that the width of the bucket of the tractor was eight feet, it is clear that the tractor had some what utilised almost the entire nine feet that would been its rightful path. This would mean that given the width of the tractor and the fact that it had to make a sharp turn from the Pasir Gudang highway to enter the Kuala Masai road, it is highly probable that the tractor would have slightly encroached into the opposite side. The first defendant was not an experienced driver in that he had been driving the said tractor for only six months. As such in all probability he would have found it difficult to make a turn from a highway into the Kuala Masai road and to proceed uphill. In examination-in-chief the first defendant stated that his speed was 5–10 km/h. However under cross-examination he testified that the speed was 10–15 km/h. In my view a slight difference in speed of a tractor would make a change in the situation. A speed of 10–15 km/h on an incline road would have made it more difficult for the first defendant to take any evasive action. In any event bearing in mind that the tractor was seven and a half feet wide, and with its bucket eight feet wide and weighed five and a half tons, the first defendant ought to have driven the tractor as close as possible to his left-edge of the road. On the evidence as a whole, I am of the opinion that on the balance of probability the accident occurred in the center of the road. Learned counsel for the defendant in his submission also accepted that the accident happened near the center of the road. In this respect the plaintiff's evidence during examination-in-chief is as follows:

A B C D E F G H

> Tak pasti jika bahagian kanan JCB ada di tengah jalan.
>
> Setuju patut bawa motosikal di kiri jalan.
>
> Saya di lorong saya tapi hampir ke tengah.
>
> Saya jalan hampir tengah jalan walaupun nampak JCB datang.
>
> Setuju langsung tak elak ke kiri walaupun nampak JCB datang. Tak tahu sama ada kemalangan akan berlaku jika saya bawa motosikal di sisi jalan.
>
> (*Note: JCB is the tractor driven by the first defendant*)

[7] In my view any prudent and sensible rider of a motorcycle in the circumstances of the case would have quickly move closer to the edge of the road. This brings me to the case of the English Court of Appeal in *Baker v Market Harborough Industrial Cooperative Society* [1953] 1 WLR 1472, which has been drawn to my attention by learned counsel for the defendants, which states the following principles:

I

A …where the evidence established that a collision between two motor vehicles proceeding in opposite directions occurred in the center of a straight road during the hours of darkness when both drivers were killed, the inference, in the absence of any evidence enabling the court to draw a distinction between them, was that each driver was committing almost the same acts of negligence — failing to keep a proper lookout and to drive his vehicle on the correct side of the road — and accordingly both were equally to blame.

[8] There is one matter of importance that I need to address. It is this. *Baker's* case does not lay down any proposition of law as was made clear by Thomson CJ in the case of *Ong Yam Chong & Anor v Chan Wah* [1962] MLJ 184, where His Lordship stated at p 187:

C I think I should make it clear that in my view we are not treating the decisions of the English Court of Appeal in *Baker v Market Harborough Industrial Co-operative Society Ltd* and in *France v Parkinson* as laying down any rule of law but rather as illustrative of the application of principles of logic and commonsense to circumstance which do not infrequently arise.

[9] In the instant case the credibility or reliability of the plaintiff and the first defendant as well as PW2 has been in dispute. I do not have the advantage of observing and hearing the witnesses. I do not have the opportunity to observe their demeanour. I am in no position to come to any satisfactory conclusion on the printed evidence whether or not they were reliable and credible or otherwise. My findings which I have adumbrated above depend entirely upon inferences drawn from other facts. In my opinion the plaintiff and the first defendant were committing almost the same act of negligence: failing to keep a proper lookout and failing to drive their vehicles on the correct side of the road. I accordingly find that the principles in *Baker's* case apply to this case. I find both the parties contributed equally to the accident and each party is 50% to blame. In the result I dismiss this appeal with costs.

Appeal dismissed.

Reported by AG Kalidas